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Supreme Court, U.S.
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No. 98-064

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

Conrail makes three arguments, stated in the alternative, that raise points not made in Petitioner's brief. First, Conrail presents an interpretation of the applicable regulations that, as we will show, is at substantial variance with their plain language and intent. Second, Conrail contends that "even if the Court were to announce" that the use of alternate measures is required by federal regulations, "a retrial of this case under that ruling would not change the outcome here." (Respondent's brief at p. 4). Finally, the railroad contends that "petitioner failed to raise the issue presented here in the trial court." (Respondent's brief at p. 5, 6). This reply will show that these contentions, intended to diminish the importance of this Petition, are wrong as a matter of fact and law.

I. CONRAIL'S RESPONSE DISTORTS THE PLAIN MEANING OF THE FEDERAL REGULATIONS IN DEFENSE OF A CONTINUING PRACTICE THAT UNDERMINES CONGRESSIONAL INTENT.

Conrail's interpretation of the applicable regulations is summarized at page 7 of Respondent's brief:

> A warning system that gives positive warning of the 'presence' of a train is an 'active' warning system under the regulation, whether or not it provides a positive warning of the approach of a train. The signal at the Back Orrville Road was an 'active' system on the evening of the accident. (Emphasis added).

This interpretation negates the plain meaning of language that

unequivocally mandates that automatic warning devices "shall be maintained to activate in accordance with the design of the warning system . ." 49 C.F.R. §234.225 (emphasis added). The essence of the design, as spelled out in 23 C.F.R. §646.204(j), is the ability of the system to "display to motorists a positive warning of the approach or presence of a train." Because automatic warning devices are able to "change aspect upon the approach or presence of a train," they are defined in the regulations as "active" warning devices. The term "active" literally means the ability to give motorists a "positive" notification that the arrival of a train is imminent.

Notwithstanding the manifest intent of these regulations to ensure that motorists receive a positive signal indicating that the arrival of a train is imminent, Conrail advances an argument that turns the plain meaning of the regulatory language and the intent of Congress on its head. According to Conrail, the terms "active" and "activated", as used in the regulations, mean the same thing. Therefore, the warning system is being maintained in accordance with its design so long as the devices are mechanically operational and regardless of whether or not they can provide a positive signal that the arrival of a train is imminent. This leads to the absurd conclusion that the Congressional intent expressed in these regulations is complied with if the warning system is able to indicate the presence of a stopped train that is not approaching but is unable to provide motorists with a positive signal that another train is approaching.

Conrail's response makes it clear that it views the practice of keeping trains stopped within the circuitry near multi-track crossings equipped with federally mandated automatic warning devices, without taking measures to prevent a crash if another train approaches, as fully compliant with federal regulations. This interpretation of the regulations helps to explain why, notwithstanding the expenditure of billions in federal funds to equip crossings with automatic warning systems, there were 1,889 fatal crashes between 1982 and 1992 at

crossings equipped with federally mandated automatic warning devices. (Petition App. II at p. 219a). Conrail's response also shows why the needless carnage being caused by this deadly practice will continue unless this Court effectuates Congressional intent expressed in these federal regulations by establishing a bright line standard requiring preventative measures when a train stops near a main line crossing and disables automatic warning devices from operating in accordance with their intended design.

This fact becomes even clearer in light of Conrail's response regarding 49 C.F.R. §234.209 that requires safety measures when the "normal functioning" of automatic warning devices is interfered with by a train "standing within the system's approach circuit." Conrail argues that the requirements of this regulation were not violated because "the signal system was operating properly, as designed, and Conrail's engineer was operating the train lawfully and in accordance with Conrail's rules." (Respondent's brief at p. 4). According to Conrail, the "FRA expressly rejected any requirement that railroads provide alternative warnings when signal systems are activated by trains engaged in normal train movements, such as those in which INPI-7 was engaged." (Respondent's brief at p. 8). What Conrail is here saying is that the FRA intended to allow railroads to keep trains stopped within the circuitry as long as they wish and, so long as the system is mechanically operational, this practice should not be interpreted as interference with the normal functioning of the system; and, therefore, there is no need to take "measures to provide for the safety of highway traffic that depends on the normal functioning of such system." In other words, the FRA has given railroads a green light to stop trains within the circuitry near multi-track crossings without doing anything to protect against a train/car collision.

What makes the need for this Court's intervention so urgent is the fact that the extant confusion on the part of courts regarding the intent of these regulations has created a disincentive for railroads to use cost-free measures that can easily

provide for the safety of traffic that depends on the normal functioning of automatic warning devices. The evidence in the instant case, for example, showed that the Jones catastrophe could have been prevented by (1) placing a flagger at the crossing while another train was approaching; (2) advising the moving train by radio of the danger and directing it to reduce its speed to a safe level as it approached the crossing; or (3) blocking the crossing with one of the engines from the stopped train during periods of danger. Because the railroad knew well in advance that it would stop a train at the Back Orrville Road crossing, these measures could have been used without delay or cost to the railroad. Consequently, there is simply no legal, moral or economic justification for permitting railroads to blatantly disregard Congressional intent by continuing this deadly practice unchanged; and that, in the final analysis, is why a writ should issue in this case.

II. CONRAIL'S RESPONSE SUBSTANTIALLY MISINTERPRETS THE RELATIONSHIP BETWEEN *LANDRIGAN* AND THE APPLICABLE REGULATIONS.

Conrail's response becomes even more untenable when it turns to this Court's decision in Baltimore & P.R. v. Catharine Landrigan, 191 U.S. 461 (1903). According to Conrail, Landrigan is irrelevant to this inquiry because in that case, "the gate operation was not automatic, i.e., 'activated' by the approach or 'presence of a train,' as specified under 23 C.F.R. §646.204(j)." Because the crossing in Landrigan did not have an automatic warning system, Conrail contends that "it was not an `active warning' system as defined by FRA . . (and, therefore,) the Court's decision in Landrigan cannot be applied to affect the scope of a railroad's duty at today's active-warning crossings." (Respondent's brief at p. 9).

The plain language of 23 C.F.R. §646.204(j) shows why this argument requires a reply. The regulation states:

> Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing lights, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists a positive warning of the approach or presence of a train. (Emphasis added).

It is precisely this language which, as Petitioner has shown, expresses the intent of Congress in these regulations to effectively codify this Court's reasoning in Landrigan. That one of this nation's major railroads could be so unapologetically dismissive of this Court's reasoning in Landrigan, particularly in the face of such unambiguous regulatory language, provides stark proof of the need for this Court to revisit Landrigan and to bring that decision's clearheaded and commonsensical approach to grade crossing safety to bear on these regulations in a way that will effectuate congressional intent.

III. CONRAIL'S RESPONSE CONTAINS MATERIAL MISSTATEMENTS OF FACT THAT DERROGATE THE IMPORTANCE OF THE ISSUE RAISED BY PETITIONER.

Conrail makes several factual assertions that need to be corrected in order that this Court not be misled regarding the importance of this Petition. First, Conrail contends that, contrary to Petitioner's assertions, the INPI-7 train "was stopped for only a few minutes" prior to the arrival of Scott Jones, and not for "at least ten minutes" as Petitioner claims. This implies that the Petitioner is making a mountain out of a molehill and that the Jones case is not an indication of a practice that warrants this Court's intervention.

The testimony and evidence, including Conrail's own official time records (Petition App. EE at 192a), however,

overwhelmingly support Petitioner's version of the record. In fact, the trial court, in a post-trial Memorandum Opinion, expressly found as follows:

> The plaintiff's proposition that the defendant was negligent as a matter of law is anchored in the undisputed fact that the signal gates and flashers that protected the crossing had been activated at least 10 minutes earlier when another of the defendant's trains headed in the opposite direction had activated the signal system for the crossing. (Petition App. C at 9a) (Emphasis added).

Moreover, numerous witnesses testified that Conrail regularly stops trains on the north side of this crossing with the gates and lights activated for extended periods. (Petition App. JJ-LL, p. 220a-226a).

This attempt by Conrail to shorten the time its train was stopped prior to the crash implicitly reflects Conrail's recognition that an extended activation of automatic warning devices calls for preventative measures to prevent a train/car collision. In fact, as Petitioner has shown, the railroad industry has known for many years that automatic warning systems rapidly lose credibility with motorists when lights continue to flash and gate arms remain down for longer than a minute without the arrival of a train. Since it makes no difference to a motorist how long automatic devices are activated if the system is unable to signal the approach of a train, this fact renders academic Conrail's attempt to shorten the time its train was stopped.

Second, Conrail contends that the "jury's finding that Conrail was not negligent was correct and supported by the evidence even under the duty argued by the petitioner here," because "Conrail's crew was attempting to provide supplemental warnings to motorists at the crossing." (Respondent's brief at

5). This insinuates that Conrail has rules that require preventative measures under the circumstances at issue. The truth is that the undisputed testimony of Conrail's employees in this case established that the railroad's rules do not require the use of preventative measures when, as in the instant case, a train remains stopped within the circuitry near a main line multi-track crossing. (Petition App. L at 78-a, 81-a, 82-a and App. M at 89-a).

Compelling confirmation that Conrail's rules do not require preventative measures can be found in Wightman v. Consolidated Rail Corporation, 94 Ohio App.3d 389 (1984); Erie Cty. Ct. of Appeals, E-97-001 (1997), discussed at p. 9 of Petitioner's brief. In Wightman, a Conrail train stopped near a main line crossing in Ohio to make mechanical repairs. As did the engineer and conductor of the stopped train in the instant case, the engineer and conductor of the stopped train in Wightman knew that a dangerous situation existed and that high speed trains were due. Nevertheless, no measures were taken to prevent a crash and, after the warning system had been activated for at least 40 minutes, a freight train traveling 60 mph struck a passenger car, killing two teen-age girls. The second trial in Wightman to determine punitive damages, which took place after the Jones trial, resulted in a punitive damage award against Conrail of $25 million for failing to take preventative measures. As in Jones, the crux of the matter in Wightman was Conrail's failure to take safety measures during an extended activation of flashing lights and automatic gates. Since the standing train was an obstruction to the operator of the Wightman car and, therefore, created a situation even more dangerous than that which confronted Scott Jones, it is clear that Conrail's rules do not require preventative measures, regardless of how dangerous are the circumstances caused by the extended activation.

Finally, Conrail's factual recitation portrays Scott Jones as negligent for driving up "to a railroad grade crossing where the roadway was closed to traffic by automatic gates and flashing

lights and for failing to look and listen for the train" that was visible "for at least 17 seconds before the accident." (Respondent's brief at 3). These assertions nicely express a corporate attitude that was roundly rebuked in Landrigan. In that case, as is Conrail's practice today, the railroad routinely allowed gates to remain down, regardless of whether or not the approach of a train was imminent. Plaintiff's decedent was struck and killed by a train as he crossed the tracks and this Court found that, under such circumstances, the gates provided "warning of nothing" and had "no more relation to passing trains than the signal tower or any inanimate object at or near the crossing." Landrigan at 475 of Petitioner's brief at 15. Consequently, the Landrigan court held that it is irrational to find a plaintiff negligent as a matter of law for proceeding around gates that have been rendered useless as a warning device by the railroad's failure to maintain them in accordance with their design.

Notwithstanding Landrigan or the existence of a regulatory scheme manifestly intended to codify its reasoning, Conrail obviously believes that, under the current status of the law, it has every right to cause an extended activation, deprive motorists of a positive signal that a train is approaching, place the entire burden of detecting the presence of a train on motorists, and, if a catastrophe does occur, charge the driver, who decided to proceed rather than wait until the railroad was ready to unblock the highway, with sole responsibility for the crash. Because the courts below, as other courts have done, accepted this interpretation of the law, we urge this Court to intervene and rule that federal law does not countenance this deadly and unconscionable operating practice.

IV. CONRAIL'S CONTENTION THAT JONES FAILED BELOW TO RAISE THE ISSUE PRESENTED HERE MISSES COMPLETELY THE POINT OF THIS PETITION.

Jones vigorously sought a ruling in the trial court, through summary judgment, by a motion for directed verdict, and by requested jury instructions, that Conrail was negligent as a matter of law for failing to take measures to prevent a train/car collision while the automatic warning devices were disabled from providing motorists with a positive signal that the arrival of a train was imminent. Nevertheless, Conrail contends that the issue raised here was not raised below because in a post-trial memorandum "petitioner's counsel wrote that this liability theory 'struck him like a lightning bolt several days after the jury's verdict . . .'" (Respondent's brief at p. 6). This attempt by the Respondent to turn this Petition into a quibble over how Jones characterized the railroad's acts and omissions below misses the point completely and thereby shows why intervention of this Court is so urgently needed.

What struck Petitioner's counsel "like a lightning bolt several days after the jury's verdict" was not the need for a new legal theory but, rather, that he had failed to fully appreciate the fact that this Court, almost 100 years ago, had cogently articulated in Landrigan the rationale underlying the entire regulatory scheme intended to ensure that federally mandated warning systems are "maintained to activate in accordance with the design of the warning system." That Petitioner's counsel missed this fact is hardly surprising since, as Petitioner has shown, courts have almost universally failed to grasp the significance of Landrigan and, thereby, have opened the door for railroads to pursue the strategy reflected in the arguments Conrail raises here. Indeed, the very fact that distinguished judges below accepted Conrail's argument that mechanical operation of automatic warning devices should be equated with providing motorists with an "active" warning of danger, dramatizes the need for this Court to intervene to correct an ongoing pattern of conduct by railroads that can be directly traced to the failure of lawyers and judges alike to grasp what this Court so clearly saw nearly 100 years ago, namely, that crossing gates that are allowed to remain closed can provide

motorists with "warning of nothing." In a nutshell, that is why a writ should issue in this case.

Finally, it is worth noting that when Jones moved for a new trial on the basis that the Court's instructions had erroneously failed to incorporate duties imposed on railroads by federal law, the trial court acknowledged that Jones's motion presented "a comprehensive and compelling argument . . . when the competing interests of the safety of the motoring public and the complexities of the operation of a railroad are considered." After thus recognizing the importance of the issue raised by petitioner here, Judge David Dowd ruled that "the best opportunity for a definitive decision on the issues raised by . . . (Jones's) motion" was an appeal to the United States Court of Appeals for the Sixth Circuit. (Petition App. C, p. 12a). It is the fact that the Sixth Circuit's decision undermines Congressional intent, at great cost to public safety and without any benefit to railroads, that makes the need for this Court's intervention so compelling.

CONCLUSION

The Court should grant Jones's Petition for a Writ of Certiorari.

Respectfully submitted,

/S/_____

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APPENDIX

APPENDIX JJ

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones, Plantiff,	))
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation, Defendant.	) No. 5:94CV2021)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE DAVID D. DOWD,
JUDGE OF SAID COURT, AND A JURY,
ON THURSDAY, MAY 2, 1996.

VOLUME 2

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* * *

[p.251]

Jackie Krajcik - Cross

Q. Okay. And I assume from time to time there is a lot of traffic there and the drivers are rather impatient; is that correct?

A. Yes, because you can go there and you can sit for a long, long time, um-hum.

Mr. Godshall: Thank you very much.

The Witness: Okay.

Mr. Murray: Just one question.

REDIRECT EXAMINATION OF JACKIE KRAJCIK BY MR. MURRAY:

Q. How do you know that you can go there and sit for a long, long time?

A. I've sat there for varous amounts of times, and plus people, lots of people have always complained about what can happen, you can get there and have to sit from anywhere from five minutes to maybe a half hour, maybe longer. I mean --

* * *

APPENDIX KK

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones,	)
Plantiff,	)
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation,	) No. 5:94CV2021
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ON THURSDAY, MAY 2, 1996.

VOLUME 2

Veronica Zimmerman - Direct

[p.274]

Q. How often as of, say, February of 1994 would you have been driving either way on Back Orville Road over the

crossing?

A. I drove every day until I moved to Orville.

Q. Had you ever encountered that same situation previously, that is gates down, traffic proceeding, stopped train?

A. Yes.

* * *

APPENDIX LL

UNITED STATICS DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rebecca A. Jones,	)
Plantiff,	)
	) Judge David Dowd
v.	) Akron, Ohio
	) Civil Action
Consolidated Rail Corporation,	) No. 5:94CV2021
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JUDGE OF SAID COURT, AND A JURY,
ON THURSDAY, MAY 2, 1996.

VOLUME 2

Matt Seiler - Direct

[p. 338]

Q. If you would be kind enough to show us what you observed regarding change in railroad activity at that time.

A. Most of the trains would stop in this area.

Q. Okay. Would you just identify "this area" so it's in the record for us? Please address the jury, if you would.

A. In this area it's wide open, there is nothing here, and this is in between the big oak tree and the utility shed here.

Q. Okay.

A. And as I stated I lived there so I could see this whole portion of the railroad tracks.

Q. All right. Now, how often during that period of time, that is between the point where they went to one track to the southeast, how often would you observe trains stopped to what would be the northwest side of the crossing?

A. Daily.

Q. All right. When you would observe trains stopped there, can you give us some indication how many of those trains would be back in the area you have just indicated, what percentage?

A. Ninety.

Q. What about the other ten percent?

A. Be back behind the tree.

* * * *